IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-961

WARREN GAMBINO,

Petitioner,

versus

STATE OF LOUISIANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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Petitioner respectfully prays that a writ of certiorari issue to review the final order of the Supreme Court of the State of Louisiana entered herein on September 5, 1978, affirming Petitioner's conviction for the crime of obscenity under Louisiana Revised Statute 14:106.

OPINION BELOW

The opinion of the Louisiana Supreme Court is reported at 362 So. 2d 1107 (La. 1978). A copy of said opinion is appended hereto, *infra* at p. 1a.

JURISDICTION

The final order of the Louisiana Supreme Court was made and entered on September 5, 1978. The Louisiana Supreme Court denied your Petitioner's application for rehearing on October 5, 1978 and, on the same day issued a stay of mandate until December 15, 1978, pending application for certiorari to this Honorable Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED FOR REVIEW

I. May the Louisiana Obscenity Statute, L.R.S. 14:106, as interpreted in this case, be applied retroactively?

II. Is the Louisiana Obscenity Statute, L.R.S. 14:106 F (1), as applied in this case, void for vagueness and overbreadth?

III. Did the Trial Court's refusal to charge the jury on an essential element of the offense deny defendant his Sixth and Fourteenth Amendment rights?

IV. Does conviction by five out of six members of a jury satisfy the requirements of the Sixth and Fourteenth Amendments?

V. Did the Louisiana Supreme Court, in its independent review of "National Screw" apply standards contravening the First and Fourteenth Amendments?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States, Amendment I: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

The Constitution of the United States, Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . ."

The Constitution of the United States, Amendment XIV, Section 1: ". . . nor shall any state deprive any person of life, liberty, or property without due process of law . . ."

The Constitution of the State of Louisiana, Article I, Section 17: ". . . A case in which the punishment may be confinement at hard labor or confinement without hard labor for more than six months shall be tried before a jury of six persons, five of whom must concur to render a verdict . . . ."

Louisiana Revised Statutes 14:106 F (1):

> Except for those motion pictures, printed materials and photographic materials showing actual ultimate sexual acts or simulated or animated ultimate sexual acts when there is

> an explicit, close-up depiction of human genital organs so as to give the appearance of the consummation of ultimate sexual acts, no person, firm or corporation shall be arrested, charged or indicted for any violation of a provision of this section until such time as the material involved has first been the subject of an adversary hearing under the provisions of this section, wherein such person, firm or corporation is made a defendant and, after such material is declared by the court to be obscene, such person, firm or corporation continues to engage in the conduct prohibited by this section. The sole issue at the hearing shall be whether the material is obscene.

Louisiana Revised Statutes 14:106 is printed in its entirety, *infra*, at p. 17a.

Louisiana Revised Statutes 14:41, 14:41.1 and 14:89, which are of only marginal relevance, are printed *infra* at p. 24a.

STATEMENT OF THE CASE

On July 27, 1977, in an *in rem* adversary hearing held in accordance with L.R.S. 14:106 F (1), *supra*, the July issue of "National Screw" magazine was declared obscene by a magistrate of the Criminal District Court of Orleans Parish. The newsstand operator who was made a party to that proceeding was warned that if he

continued to sell the magazine, he would be subject to criminal charges. Warren Gambino was not a party to nor aware of that hearing, yet he was arrested for the sale of the same issue of the same magazine three days later on July 30, 1977.

Warren Gambino received no prior adversary hearing or warning to cease selling the magazine. He was charged, tried, convicted and sentenced to imprisonment under the broad provisions of L.R.S. 14:106 A, *infra* at p. 17a, rather than the narrower provisions of L.R.S. 14:106 F (1), *supra*. Why the District Attorney chose to afford a prior adversary hearing to the newsstand owner but not Gambino when both sold the same publication is an unanswered question.

In addition to sexually oriented material, "National Screw" contained an abundance of written and pictorial material, including public figure interviews, political comment, popular sociology, and short stories. "National Screw" contains no depiction of sexual penetration.

Prior to trial, Gambino filed a Motion to Quash alleging that his arrest for obscenity was unlawful in the absence of a prior adversary hearing mandated by L.R.S. 14:106 F (1), *supra*. The Trial Judge denied the Motion, finding that "National Screw" contained depictions of "the consummation of ultimate sexual acts" on three pages. An Exception to the ruling was perfected and the issue raised again on appeal to the Louisiana Supreme Court by means of a Bill of Exceptions.

Gambino's first trial, on September 29, 1977, resulted in a hung jury. At his second trial, on November 9, 1977, a six man jury convicted Gambino by a 5 to 1 vote. Although no exception has reserved to the majority jury verdict, its implicit issue constitutes "plain error", STATE v. WRESTLE, INC., 360 So. 2d 831 (La. 1978), and may be considered by this Honorable Court pursuant to Supreme Court Rule 40(d)(2) and SILBER v. UNITED STATES, 370 U.S. 717, 82 S.Ct. 1287 (1962); PIPEFITTER'S LOCAL UNION NO. 562 v. UNITED STATES, 407 U.S. 385, 92 S.Ct. 2247 (1972). This Honorable Court has granted Writs of Certiorari in STATE v. WRESTLE, INC., *supra, sub nom* DANIEL BURCH v. STATE OF LOUISIANA (No. 78-90) in order to determine the constitutionality of conviction by 5 members of a six man jury.

At both trials, the trial judge refused to grant Defendant's requested jury charge number 9, which stated:

> "Determination of this second element is a three-step procedure. First you must determine whether or not the magazine shows actual ultimate sexual acts or simulated or animated ultimate sexual acts when there is an explicit close-up depiction of human sexual organs so as to give the appearance of the consummation of ultimate sexual acts."

An Exception was reserved to the refusal to grant this charge and the issue was raised on appeal to the

Louisiana Supreme Court by way of a Bill of Exceptions.

Following his conviction, Gambino was sentenced to six months imprisonment and a $1,000.00 fine.

On appeal, the Louisiana Supreme Court, by a four to three plurality and for the first time, held that the "consummation of ultimate sexual acts" did not require sexual penetration. One of the concurring justices opined that "ultimate sexual acts" were "all behavior clearly having no goal other than sexual penetration" but that the "consummation" of such behavior did not require sexual penetration. Three dissenting justices generally stated that the magazine showed no "ultimate sexual acts" and that Gambino had been unlawfully arrested.

In its opinion, the Louisiana Supreme Court failed to explain why the jury should not have been allowed to determine whether or not the magazine depicted "consummation of ultimate sexual acts." Since, the opinion incorrectly stated that the jury had, in fact, made such a determination, the issue was again raised in an application for rehearing which was denied with three justices dissenting.

In connection with its independent review of "National Screw", the Louisiana Supreme Court stated at 362 So. 2d 1111:

"Conceding arguendo that some material in the magazine is of a serious literary, artistic, political or scientific value, that material has no rational relationship to that found by the jury, the trial judge and this Court to be hard-core sexual depictions, it is the offensive depiction of sexual conduct itself which must have 'serious literary, artistic, political or scientific value' to merit First Amendment protection."

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. The Louisiana Obscenity Statute, L.R.S. 14:106, As Interpreted In This Case, May Not Be Applied Retroactively:

In BOUIE v. CITY OF COLUMBIA, 378 U.S. 347, 352, 353, 84 S.Ct. 1697, 1702 (1964), this Honorable Court stated:

"There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language. As the Court recognized in Pierce v. United States, 314 U.S. 306, 311, 62 S.Ct. 237, 239, 'judicial enlargement of a criminal act by interpretation is at war with a fundamental

concept of the common law that crimes must be defined with appropriate definiteness.' Even where vague statutes are concerned, it has been pointed out that the vice in such an enactment cannot 'be cured in a given case by a construction in that very case placing valid limits on the statute,' for

'the objection of vagueness is two-fold: inadequate guidance to the individual whose conduct is regulated, and inadequate guidance to the triers of fact. The former objection could not be cured retrospectively by a ruling either of the trial court or the appellate court, though it might be cured for the future by an authoritative judicial gloss. * *' Freund, The Supreme Court and Civil Liberties, 4 Vand.L.Rev. 533, 541 (1951)."

In Louisiana, one may generally be arrested and prosecuted for the crime of obscenity only if he has been judicially warned in a prior adversary hearing that the materials he intends to distribute are obscene. See L.R.S. 14:106 F (1). The sole exception to this legislative policy occurs in the case of materials which show "an explicit close-up depiction of human genital organs so as to give the appearance of the consummation of ultimate sexual acts".

Prior to the Louisiana Supreme Court's opinion in this case, most people would have thought that the "consummation of ultimate sexual acts" required some form of sexual penetration. Such a construction is suggested by other Louisiana Statutes and their judicial interpretations establishing criminal penalties for acts of coitus, anal and oral intercourse. The crimes of Rape, L.R.S. 14:41, *infra* at p. 24a, Homosexual Rape, L.R.S. 14:41.1, *infra* at p. 24a, and as interpreted in STATE v LONG, 133 La. 580, 63 So. 180 (1913), Crime Against Nature 14:89, *infra* at p. 25a, all require sexual penetration "however slight" for completion or consummation. Likewise, the only judicial gloss, prior to the instant case, indicated that penetration was the *sine qua non* of "ultimate sexual acts". See HUFFMAN v. UNITED STATES, 502 F.2d 419, 423 (D.C. Cir. 1974).

Armed with common sense, a dictionary, and the existing body of law, Warren Gambino could not possibly have foreseen immediate arrest and prosecution, much less conviction and imprisonment, for selling a copy of "National Screw" which contains no depictions of sexual penetration.

Under such circumstances, the Louisiana Supreme Court's interpretation of L.R.S. 14:106 F (1) should not be applied retroactively.

2. The Louisiana Obscenity Statute, R.S. 14:106 F (1), As Applied In This Case, Is Void For Vagueness And Overbreadth:

Subjective definitions of criminal conduct offend the due process requirements of the Fourteenth Amendment because they fail to provide fair notice of "what the law commands or forbids," LANZETTA v. NEW JERSEY, 306 U.S. 451, 453, 59 S.Ct. 618, 619 (1939); see also CONNALLY v. GENERAL CONSTRUCTION CO., 269 U.S. 385, 46 S.Ct. 126 (1926); RABE v. WASHINGTON, 405 U.S. 313, 92 S.Ct. 993 (1972); INTERSTATE CIRCUIT, INC. v. DALLAS, 390 U.S. 676, 88 S.Ct. 1298 (1968); WINTERS v. NEW YORK, 333 U.S. 507, 68 S.Ct. 665 (1948), and because they invite arbitrary and erratic enforcement of the law, see PAPACHRISTOU v. CITY OF JACKSONVILLE, 405 U.S. 156, 92 S.Ct. 839 (1972); NIEMOTKO v. MARYLAND, 340 U.S. 268, 71 S.Ct. 325 (1951); THORNHILL v. ALABAMA, 310 U.S. 88, 60 S.Ct. 736 (1940). Although the phrase "consummation of ultimate sexual acts" is capable of an objective definition, i.e., sexual penetration, the Louisiana Supreme Court expressly rejected such an objective standard.

Instead of providing an objective definition, the opinion of Justices Summers, Sanders and Marcus merely described the photographs in question and subjectively concluded that they "give the appearance of the consummation of the ultimate sexual act of cunnilingus." This subjective standard appears to be the same "I

know it when I see it" advanced by Justice Stewart's concurring opinion in JACOBELLIS v. STATE OF OHIO, 378 U.S. 184, 197, 84 S.Ct. 1676, 1683 (1964). The manner in which the photographs, which show no actual contact between oral and genital organs, depict "consummation" is locked forever in the minds of the justices who formulated the opinion, where it provides no instruction for those who must enforce or abide by the law.

The concurring opinion of Justice Dennis piles subjectivity on subjectivity. Although the other majority justices identified "ultimate sexual acts" as coitus, anal and oral intercourse, Justice Dennis defined the phrase as "all behavior clearly having no goal other than sexual penetration". Even if this subjectively phrased definition of "ultimate sexual acts" is correct, what, other than sexual penetration, constitutes "consummation" of behavior clearly having no goal other than sexual penetration?" The opinion suggests only that the actions depicted must be near penetration. This "close enough" standard offers no aid to those who must interpret the law.

The abuses which must follow such subjective interpretations are reflected by the facts of this case. Three days prior to Gambino's arrest, the July, 1977 issue of "National Screw" was declared obscene in a prior adversary hearing held pursuant to L.R.S. 14:106 F (1) in the Criminal District Court for Orleans Parish. The newsstand operator who was made a party to that

hearing was given a "judicial warning" to cease selling the magazine but Warren Gambino, who was not made a party to the hearing and who received no such warning was tried, convicted and sentenced to imprisonment for selling the same magazine. Cf. McKINNEY v. ALABAMA, 424 U.S. 669, 96 S.Ct. 1189 (1976). The subjective nature of the test for "consummation of ultimate sexual acts" announced by the Louisiana Supreme Court in this case will foster such erratic enforcement in the future and should not be allowed to stand.

3. Gambino Was Deprived Of A Trial By Jury On An Essential Element Of The Offense:

"Implicit in the right to trial by jury afforded criminal defendants under the Sixth Amendment to the Constitution of the United States is the right to have the jury decide all relevant issues of fact." UNITED STATES v. HAYWARD, 420 F.2d 142, 144 (D.C. Cir., 1969); See also UNITED BROTHERHOOD, ETC. v. UNITED STATES, 330 U.S. 395, 408, 409, 67 S.Ct. 775, 782 (1947).

The issue of whether or not "National Screw" contained depictions of "consummation of ultimate sexual acts" was an essential and relevant issue of fact insofar as Gambino could not have been convicted of (or even arrested for or charged with) the crime of obscenity in the absence of such depictions. See L.R.S. 14:106 F (1).

Despite Gambino's requests for special jury charges, the Trial Court refused to submit the issue to the jury. The Trial Court's error was compounded because the jury was instructed to apply the broader standards of L.R.S. 14:106 A only, and may thus have convicted Gambino on the basis of depictions which normally would have subjected him only to an adversary hearing. Compare 14:106 A (2) (b)-(c)-(d) with 14:106 F (1).

It should be noted that the trial court not only refused defendants' special instructions but did not even read subparagraph F to the jury, thus pretermitting any possible knowledge or consideration by the jurors of this element of the crime. In effect, a directed verdict of an essential element of the offense was granted the State.

4. Conviction By Five Out Of Six Jurors Does Not Satisfy The Requirements Of The Sixth And Fourteenth Amendments:

Prior to 1974, Louisiana law provided for a jury of five for lesser felonies with a requirement for a unanimous verdict. The law then was substantially similar to the Georgia jury provision invalidated earlier this year by this Court in BALLEW v. GEORGIA, 98 S.Ct. 1029 (1978). The new 1974 Louisiana constitution changed this requirement by adding a sixth juror, though requiring that only five must concur to render a verdict. Article I, Section 17. It is submitted that the principles and considerations which caused this Court

to invalidate the Georgia jury provision in BALLEW apply with equal if not greater force to the Louisiana provision for a non-unanimous six-person jury.

In WILLIAMS v. FLORIDA, 399 U.S. 78, 90 S.Ct. 1893 (1970) this Court held that a six-man jury did not violate Sixth Amendment rights, because such a jury should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and should provide a fair possibility for obtaining a representative cross-section of the community. The Court stated:

> "But we find little reason to think that these goals are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers twelve — particularly if the requirement of *unanimity is retained.*" (emphasis added) 399 U.S. 100, 90 S.Ct. 1906.

In Louisiana, since unanimity is not required in a six-man jury, the question arises as to whether the goals mentioned by this Court will be achieved by permitting conviction upon the agreement of five of the six jurors. In BALLEW, Justice Blackmun, writing for the Court, expressed the concern that with a jury of less than six, the chance for hung juries would decline, to the detriment of the defense. Clearly, this concern applies to a Louisiana six-person jury with greater force, since only five persons are required for conviction.

The concurring opinions in BALLEW, *supra*, suggested that a jury of less than six would "fail to represent the sense of the community and hence not satisfy the fair cross-section requirements of the Sixth and Fourteenth Amendments". 98 S.Ct. 1042. In an obscenity prosecution like the present case, this failure is especially critical as the jury must, as a practical matter, draw on the experiences of its members in determining community standards. When the experiences of one juror may be ignored, as in this case, the probability of a correct determination is probably less and certainly no greater than with a five man jury.

As previously stated, this issue has already been accepted for review in DANIEL BURCH AND WRESTLE, INC. v. STATE OF LOUISIANA, No. 78-90 on the docket of this Court. It is respectfully submitted that a Writ of Certiorari should likewise be granted in this case.

5. The Standard Applied By The Louisiana Supreme Court In Its Independent Review Of National Screw Contravened The First And Fourteenth Amendments:

In order to lose the protective blanket of the First Amendment, it must be determined that an allegedly obscene publication "taken as a whole, lacks serious literary, artistic, political or scientific value." MILLER v. CALIFORNIA, 413 U.S. 15, 24, 93 S.Ct. 2607, 2615 (1973). In its independent review of "National Screw", the Louisiana Supreme Court refused to apply this

"taken as a whole" standard, stating at 362 So.2d 1111, 1112:

> "Conceding arguendo that some material in the magazine is of a serious literary, artistic, political or scientific value, that material has no rational relationship to that found by the jury, the trial judge and this Court to be hard-core sexual depictions. It is the offensive depiction of sexual conduct itself which must have 'serious literary, artistic, political or scientific value' to merit First Amendment protection."

The contention that only the portions of a magazine having a "rational relationship" to offensive portrayals effectively removes all magazines which offend in part from First Amendment protection because magazines, unlike novels or movies which depend on organic consistency for artistic success, consist of more or less unrelated articles and pictures whose only "rational relationship" is an appeal to the consumer market served.

Although this Honorable Court has never directly addressed this issue, the District Court in PENTHOUSE INTERN., LTD. v. McAULIFFE, 454 F.Supp. 289 (N.D. Ga. 1978) held independent review of discrete portions of a magazine unconstitutional. The Court stated at 454 F.Supp. 303:

Solicitor McAuliffe has argued that the 'taken as a whole' test was devised to apply to 'works' and that when a magazine which typically is an eclectic publication containing several seemingly unrelated pieces tied together only by a central approach or theme is perused, discrete works within the magazine may be 'taken as a whole' and may independently be adjudged obscene. In support of this position, Mr. McAuliffe refers the court to famous footnote seven of *Miller* which cites with approval the statement in *Kois v. Wisconsin*, 408 U.S. 229, 92 S.Ct. 2245, 33 L.Ed.2d 312 (1972), that '[a] quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication.' Defendant McAuliffe's position is clearly incorrect.

First, the 'taken as a whole' standard of *Miller* is not really new, *see Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), and simply reflects in essence the practical fact that an arguably obscene book or magazine is going to be published or banned as a discrete unit. It is practically impossible and legally impermissible for defendant McAuliffe to tip-toe through each and every 'Playboy', 'Oui' and 'Penthouse' vended in Fulton County, scissors in hand, and to excise those portions of the magazine thought to be

obscene. A magazine is a 'whole' within the meaning of *Miller* and it must be judged as such.

It is submitted that the holding in PENTHOUSE INTERNATIONAL, *supra*, is correct and that of the Louisiana Supreme Court is erroneous.

CONCLUSION

For the above reasons, the issuance of the mandate by the Louisiana Supreme Court should be stayed and a writ of certiorari should be issued to review the judgment of that Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this ____ day of December, 1978, forwarded three copies of the foregoing Petition for Certiorari to the District Attorney for the Parish of Orleans, Honorable Harry Connick, by United States mail, postage prepaid.

WILLIAM M. LUCAS, JR.

APPENDIX

STATE of Louisiana

versus

Warren GAMBINO.

No. 61728.

Supreme Court of Louisiana.

Sept. 5, 1978.

Rehearing Denied Oct. 5, 1978.

SUMMERS, Justice.

By a bill of information the District Attorney of Orleans Parish charged defendant Warren Gambino with the exhibition, management and display of hard-core sexual conduct in the July 1977 issue of a magazine entitled "National Screw", a violation of the Obscenity Act. La.Rev.Stat. 14:106.[1] After trial by jury defendant

1 The pertinent provisions of the obscenity statute follow:

"A. The crime of obscenity is the intentional:

* * * *

"(2) Participation or engagement in, or management, production, presentation, performance, promotion, exhibition, advertisement, sponsorship, or display of, hard core sexual conduct when the trier of fact determines that the average person applying contemporary community standards would find that the conduct, taken as a

whole, appeals to the prurient interest; and the hard core sexual conduct, as specifically defined herein, is presented in a patently offensive way; and the conduct taken as a whole lacks serious literary, artistic, political, or scientific value.

"Hard core sexual conduct is the public portrayal, for its own sake, and for ensuing commercial gain of:

"(a) Ultimate sexual acts, normal or perverted, actual, simulated or animated, whether between human beings, animals, or an animal and a human being; or

"(b) Masturbation, excretory functions or lewd exhibition, actual, simulated or animated, of the genitals, pubic hair, anus, vulva, or female breast nipples; or

"(c) Sadomasochistic abuse, meaning actual, simulated or animated, flagellation or torture by or upon a person who is nude or clad in undergarments or in a costume which reveals the pubic hair, anus, vulva, genitals, or female breast nipples, or in the condition of being fettered, bound, or otherwise physically restrained, on the part of one so clothed; or

"(d) Actual, simulated, or animated touching, caressing, or fondling of, or other similar physical contact with a pubic area, anus, female breast nipple, covered or exposed, whether alone or between humans, animals, or a human and an animal, of the same or opposite sex, in an act of apparent sexual stimulation or gratification; or

"(e) Actual, simulated, or animated stimulation of a human genital organ by any device whether or not the device is designed, manufactured, or marketed for such purpose.

"(3) Sale, allocation, consignment, distribution, dissemination, advertisement, exhibition, or display of obscene material, or the preparation, manufacture, publication, or printing of obscene material for sale, allocation, consignment, distribution, advertisement, exhibition, or display.

"Obscene material is any tangible work or thing which the trier of fact determines (a) that the average person applying contemporary community standards would find, taken as a whole, appeals to the prurient interest, and (b) depicts or describes in a patently offensive way, hard core sexual conduct specifically defined in Paragraph (2) above; and (c) the work or thing taken as a whole lacks serious literary, artistic, political, or scientific value.

was convicted and sentenced to pay a fine of $1,000 and to serve six months in the parish prison. The assignments of error urged on this appeal are grouped into six arguments.

"(4) Requiring as a condition to a sale, allocation, consignment, or delivery for resale of any paper, magazine, book, periodical, or publication to a purchaser or consignee that such purchaser or consignee also receive or accept any obscene material, as defined in Paragraph (3) above, for resale, distribution, display, advertisement, or exhibition purposes; or denying or threatening to deny a franchise to, or imposing a penalty, on or against, a person by reason of his refusal to accept, or his return of, such obscene material.

"(5) Solicitation or enticement of an unmarried person under the age of seventeen years to commit any act prohibited by Paragraphs (1), (2), or (3) above.

"(6) Advertisement, exhibition, or display of sexually violent material. 'Violent material' is any tangible work or thing which the trier of facts determines depicts actual or simulated patently offensive acts of violence, including but not limited to, acts depicting sadistic conduct, whippings, beatings, torture, and mutilation of the human body, as described in Subparagraph (c) of Paragraph (2) of Subsection A herein.

* * * *

"(1) Except for those motion pictures, printed materials, and photographic materials showing actual ultimate sexual acts or simulated or animated ultimate sexual acts when there is an explicit, closeup depiction of human genital organs so as to give the appearance of the consummation of ultimate sexual acts, no person, firm, or corporation shall be arrested, charged, or indicted for any violations of a provision of this Section until such time as the material involved has first been the subject of an adversary hearing under the provisions of this Section, wherein such person, firm, or corporation is made a defendant and, after such material is declared by the court to be obscene, such person, firm, or corporation continues to engage in the conduct prohibited by this Section. The sole issue at the hearing shall be whether the material is obscene."

Briefly, the record facts giving rise to this prosecution show that defendant is the owner of the Fast Stop Food Store No. 3 at the corner of Elysian Fields and Filmore Avenue in a predominantly residential neighborhood of the City of New Orleans. It is a convenience store where food, liquor, and popular magazines are sold, including such sexually oriented magazines as "Playboy", "Penthouse", "National Screw", and "Oui". Before this prosecution defendant appeared before the City Council on a complaint by a neighborhood Catholic school that these and other sexually oriented magazines were on display in a conspicuous place at the center of his store in such a manner that school children could see and buy them. At the Council's suggestion these sexually oriented magazines were placed in a separate rack at the far end of the cashier's counter so that only the titles were visible, and the matter was dismissed.

Officer Rickey Bruce entered defendant's store on July 29, 1977 to investigate obscenity violations. From the book rack at the end of the cashier's counter he selected two magazines, "Climax" and "National Screw", issue of July 1977, which he purchased, paying $4.18 for both. After ascertaining that defendant was the owner of the store, Officer Bruce obtained an arrest warrant and Gambino was arrested. The magazine "National Screw", issue of July 1977, is the subject of this prosecution.

Assignments 1, 2, 3, 14, 15, 16 and 19 — Essentially these assignments question whether the magazine

depicts "actual ultimate sexual acts or simulated or animated ultimate sexual acts" as set forth in Section F(1) of the Obscenity Act.

The Obscenity Act prohibits the arrest of any person for violating its provisions unless they have been afforded a prior adversary hearing at which the suspect has been made a defendant and the material has been found to be obscene. Section F(1) of the Act creates an exception to this prohibition permitting an arrest and prosecution without a prior adversary hearing when the obscene material shows "actual ultimate sexual acts or simulated or animated ultimate sexual acts when there is an explicit, close up depiction of human genital organs so as to give the appearance of consummation of ultimate sexual acts."

If this Court agrees with the jury that the four pictures in question in this magazine depict ultimate sexual acts with explicit, close-up depiction of human genital organs so as to give the appearance of consummation of ultimate sexual acts then the arrest and prosecution of defendant without a prior adversary hearing was not prohibited by law.

All four pictures are photographs of women engaged in acts of cunnilingus. At least three of the photographs depict the vaginas of participants. In one photograph there is an explicit, close-up depiction of a woman's vagina. All photographs give the appearance of the consummation of the ultimate sexual act of cun-

nilingus. In two of the photographs all of the subjects are nude; in another one of the female participants is partially clothed; and the other, a close-up photograph, only portrays the vagina of one participant and the tongue, mouth, face, head, hand and shoulder of the other.

In addition to the finding of the jury, the trial judge observed in his reasons for the sentence imposed that he had reviewed the magazine and in his opinion the photographs did depict ultimate sexual acts. He stated, moreover, that the magazine had no literary, artistic, political or scientific value. In fact, he declared, the publication was trash and should not be sold in New Orleans. To impose a lesser sentence, he held, would depreciate the nature of defendant's crime.

An argument is made by the defense that his conviction was erroneous because none of the photographs depict penetration, which he asserts is essential to an ultimate sex act. Reliance is placed upon the definition of rape to support this argument. Because no penetration is depicted, the defense argues, the photograph depicts only imminent lesbian activity, acts not considered obscene in *Huffman v. United States*, 163 U.S.App.D.C. 417, 502 F.2d 419 (1974). In the *Huffman* Case the material consisted of collections of photographs of two nude or near-nude females shown undressing, caressing, fondling and embracing each other. The photographs were accompanied by brief written material, including a trilingual statement purportedly addressed to "serious students of art."

Photographs at issue in the case at bar cannot be compared with the lesbian activity in the *Huffman* Case. Those at issue here are explicit, ultimate acts of deviate sexual conduct, not the remote foreplay found in *Huffman*. In the instant case the photographs depict activity which falls within the standard of hard-core sexual conduct formulated in *Miller v. California*, 513 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). That standard permits regulation of "patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated."

Furthermore, the statutes on rape relied upon to support the defense contention that the conduct at issue here was not the ultimate sex act reprobated by the Obscenity Act are inapplicable. La.Rev.Stat. 14:41-41.1.[2] Those acts apply to rapes, both heterosexual and homosexual, involving vaginal and anal intercourse. Sexual acts prohibited by those statutes involving at least one man are unlike the deviant sexual acts at issue here involving only women. The rape statutes cited do not apply either factually or legally to the case at bar.

---

2 La.Rev.Stat. 14:41:

"Heterosexual rape is the act of sexual intercourse with a female person not the wife of, or judicially separated from bed and board from, the offender, committed without her lawful consent. Emission is not necessary; and any sexual penetration, vaginal or anal, however slight, is sufficient to complete the crime."

La.Rev.Stat. 14:41.1:

"Homosexual rape is the act of anal sexual intercourse with a male person committed without his consent. Emission is not necessary, and any anal sexual penetration, however slight, is sufficient to complete the crime."

Thus in our independent review we agree with the jury, which is the repository of community standards in this case, that the photographs in question depict the "ultimate sexual acts" contemplated by Section F(1). Accordingly, the trial judge correctly denied defendant's motion to quash, motion to suppress, and motion for a prior hearing which are at issue in these assignments of error.

Assignment 18 — Alternatively, the defense contends, that the exception to a prior adversary hearing contained in Section F(1) of the Obscenity Act is invalid because the term "ultimate sexual acts" is unconstitutionally vague. The prior adversary hearing generally required by the Act was therefore a prerequisite to this prosecution. Consequently, denial of the motion in arrest of judgment based upon this premise was error, according to defendant. In *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), the phrase "ultimate sexual acts, normal or perverted, actual or simulated" were approved as properly constituting the hard-core sexual conduct which states may regulate. The standards and definition approved in *Miller v. California* are largely the bases of Louisiana's Obscenity Act. A widespread use of the phrase has acquired a well-known and acceptable meaning, readily comprehended by the average person. As we read the defense brief, it is conceded that the phrase includes coitus, anal and oral intercourse. The photographs at issue are examples of ultimate sexual acts. In the apt words of Mr. Chief Justice WARREN, defendant in this case was

> "plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect. I believe that the State and Federal Governments can constitutionally punish such conduct. That is all that these cases present to us, and that is all we need to decide." *Roth v. United States*, 354 U.S., 476 at 496, 77 S.Ct. 1304 at 1315, 1 L.Ed.2d 1498 at 1513.

Therefore, the exception to the requirement of a prior adversary hearing is couched in constitutionally acceptable language under approved standards of statutory construction. *State v. Skinner*, 358 So.2d 280 (La.1978).

Assignments 17 and 20 — Defendant argues that the trial judge erred in refusing to grant his motion for directed verdict and motion for a new trial.

The trial was before a jury in which case a directed verdict is not permitted. La.Code Crim.Pro. art. 778.

Basically, the motion for a new trial adopts the proposition that the magazine is not obscene. Although the magazine may contain pictures showing hard-core sexual conduct, the argument goes, it does not, taken as a whole, lack "serious literary, artistic, political or scientific value". This is so, according to defendant, because the obscene pictures occur on about fifty percent of the magazine's pages while the rest of the

publication is devoted to material containing "serious literary, artistic, political or scientific value." Therefore, the magazine does not "taken as a whole" meet the test of prohibited obscenity set forth in Section A(2) of the Act.

The contention is without merit. Conceding arguendo that some material in the magazine is of a serious literary, artistic, political or scientific value, that material has no rational relationship to that found by the jury, the trial judge and this Court to be hard-core sexual depictions. It is the offensive depiction of sexual conduct itself which must have "serious literary, artistic, political or scientific value" to merit First Amendment protection. It has often been held that that obscene material is not protected by the First Amendment. *Miller v. California*, supra. Placing prohibited obscene depictions in a magazine, book, or newspaper which contain other, unrelated articles or pictures of literary, etc., value does not suffice to make obscenity legally acceptable. "A quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication." *Kois v. Wisconsin*, 408 U.S. 229, 92 S.Ct. 2245, 33 L.Ed.2d 312 (1972).

Assignments 21 and 22 — The defense contends that the State offered no evidence of community standards and the only evidence on the subject was offered by defendant's expert. This evidence, the defendant argues, indicates that the average man would not find "National Screw", July 1977, to be obscene. Thus,

defendant concludes, there is no evidence in the record that the controverted magazine lacked serious literary, artistic, political or scientific value.

The prosecution in an obscenity case need not offer expert testimony regarding community standards. "[A] juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination." *Hamling v. United States*, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974).

And no error occurred because the jury did not accept the testimony of defendant's expert. It is the function and prerogative of the jury to evaluate the evidence and accept or reject what is presented. They are not bound to accept the opinion of any expert in weighing the evidence of obscenity.

Assignment 13 — Incompetent "scientific" evidence was introduced by the State in the course of cross-examining defendant's expert witness, the defense asserts. Because of this, it is claimed, the jury rejected the testimony of the defendant's expert witness.

After extensive testimony on direct examination defendant's expert concluded that "National Screw", July 1977, was not obscene, contained material of a literary, scientific and political value and would not be considered obscene by the average adult in New Orleans. On cross-examination he was asked, over

defense objection, if he agreed with a statement of Dr. Vanderhaig, a prominent psychiatrist which appeared in the local paper to this effect: "Pornography invites us to recognize other persons purely as means to our sexual pleasure and exploit them as we exploit animals." He answered, "I agree with part of it. I don't agree with the part about exploitation."

In his per curiam to this assignment of error the trial judge wrote:

> "Defense counsel contends that court erred in allowing the State to read a quotation to Dr. Koenig [defendant's expert] during cross-examination.
>
> "Cross examination of an expert witness by reference to medical and other scientific authorities is generally sanctioned for purposes of testing his knowledge, background and accuracy and to such ends, quotations may be read to witnesses from standard treatises provided that the object is not to get their contents and opinions of the author before the jury. *State v. Sauls* [226 La. 694] 77 So.2d 8 (1955). In the present case the quotation may not have been from a standard treatise, but from the newspaper a respected literary source. The article discussed was by a well-known psychologist and was mentioned strictly for the purpose of discussing Dr. Koenig's views on the subject matter."

In our view the trial judge correctly explained the basis for his ruling, and this assignment has no merit.

Assignments 23 and 24 — A claim is made that the sentence imposed is cruel, excessive and unusual. The sentence is within the limits prescribed by statute: Not less than one hundred dollars nor more than one thousand dollars, or imprisoned for not more than one year or both. La.Rev.Stat. 14:106G.

Sentence was imposed by the trial judge in keeping with the guidelines set forth in Article 894.1 of the Code of Criminal Procedure. Compliance with that article averts the possibility of excessive or capricious sentences. It assures that the sentencing authority is given adequate information and guidance in sentencing and provides reviewable standards.

A sentence imposed by a judge within the statutory limits is generally not subject to review. *State v. Pierson*, 296 So.2d 324 (La.1974); *State v. Polk*, 258 La. 738, 247 So.2d 853 (1971).

The trial judge has not abused his discretion in this sentencing.

For the reasons assigned, the conviction and sentence are affirmed.

DENNIS, J., concurs and assigns reasons.

TATE, J., dissents and assigns reasons.

DIXON, J., dissents with reasons.

CALOGERO, J., dissents and assigns reasons.

DENNIS, Justice, concurring.

I join in the majority opinion for the reason that the photographic materials do show "actual ultimate sexual acts" in that they depict "explicit, closeup depiction of human genital organs so as to give the appearance of the consummation of ultimate sexual acts." In my opinion the "ultimate sexual act" is neither ambiguous nor intended by the legislature to be equated with penetration. Instead its meaning encompasses all behavior clearly having no goal other than sexual penetration. The pictures of imminent oral-vaginal intercourse unmistakably give the appearance of the consummation of ultimate sexual acts. Although actual penetration is not depicted, any reasonable viewer would conclude that the scenes are those of the finish or completion, i.e., the consummation, of the sexual act, and not depictions of mere foreplay which may or may not lead to sexual penetration.

TATE, Justice, dissenting.

I respectfully dissent.

In my opinion: (1) The *intended* cunnilingus's however obscene, is not the depictions of attempted "*ultimate* sex-

ual acts" so as to be hard-core pornography within the meaning of Obscenity Act, which only in such event permits arrest and conviction without a prior adversary hearing to determine whether the offensive depiction is a criminal offense; (2) If they are, then the statute is unconstitutionally vague in this respect, concerning as it does First Amendment rights of free press at issue; (3) In any event, the sentence imposed is excessive and should be set aside.

DIXON, Justice (dissenting).

I respectfully dissent, believing a prior adversary hearing is required under the Louisiana statute before defendant can be prosecuted.

CALOGERO, Justice, dissenting.

I respectfully dissent, being of the opinion that the material at issue depicts no "ultimate sexual act" and thus should have been the subject of a prior, adversary determination of the obscenity issue.

SUPREME COURT
STATE OF LOUISIANA
NEW ORLEANS

UNITED STATES OF AMERICA
STATE OF LOUISIANA

SUPREME COURT OF THE
STATE OF LOUISIANA

New Orleans, 70112

I, Andrew J. Falcon, Deputy Clerk, Supreme Court of the State of Louisiana, do hereby certify that the Court took the following action on October 5, 1978, in the matter entitled STATE OF LOUISIANA v. WARREN GAMBINO, No. 61,728

"REHEARING REFUSED"

IN WITNESS WHEREOF, I hereunto sign my name and affix the seal of the Court aforesaid, at the City of New Orleans, this the 4th day of December A.D., 1978.

/s/ ANDREW J. FALCON
Deputy Clerk
Supreme Court of the
State of Louisiana

[SEAL]

LOUISIANA REVISED STATUTES 14:

§ 106. Obscenity

A. The crime of obscenity is the intentional:

(1) Exposure of the genitals, pubic hair, anus, vulva or female breast nipples in any location or place open to the view of the public or the people at large such as a street, highway, neutral ground, sidewalk, park, beach, river bank or other place or location viewable therefrom with the intent of arousing sexual desire.

(2) Participation or engagement in, or management, production, presentation, performance, promotion, exhibition, advertisement, sponsorship or display of, hard core sexual conduct when the trier of fact determines that the average person applying contemporary community standards would find that the conduct, taken as a whole, appeals to the prurient interest; and the hard core sexual conduct, as specifically defined herein, is presented in a patently offensive way; and the conduct taken as a whole lacks serious literary, artistic, political or scientific value.

Hard core sexual conduct is the public portrayal, for its own sake, and for ensuing commercial gain of:

(a) Ultimate sexual acts, normal or perverted, actual, simulated or animated, whether between human beings, animals or an animal and a human being; or

(b) Masturbation, excretory functions or lewd exhibition, actual, simulated or animated, of the genitals, pubic hair, anus, vulva or female breast nipples; or

(c) Sadomasochistic abuse, meaning actual, simulated or animated, flagellation or torture by or upon a person who is nude or clad in undergarments or in a costume which reveals the pubic hair, anus, vulva, genitals or female breast nipples, or the condition of being fettered, bound or otherwise physically restrained, on the part of one so clothed; or

(d) Actual, simulated or animated, touching, caressing or fondling of, or other similar physical contact with, a pubic area, anus, female breast nipple, covered or exposed, whether alone or between humans, animals or a human and an animal, of the same or opposite sex, in an act of apparent sexual stimulation or gratification; or

(e) Actual, simulated or animated stimulation of a human genital organ by any device whether or not the device is designed, manufactured and marketed for such purpose.

(3) Sale, allocation, consignment, distribution, dissemination, advertisement, exhibition or display of

obscene material, or the preparation, manufacture, publication or printing of obscene material for sale, allocation, consignment, distribution, advertisement, exhibition or display.

Obscene material is any tangible work or thing which the trier of fact determines (a) that the average person applying contemporary community standards would find, taken as a whole, appeals to the prurient interest; and, (b) depicts or describes in a patently offensive way, hard core sexual conduct specifically defined in Paragraph (2) above; and (c) the work or thing taken as a whole lacks serious literary, artistic, political or scientific value.

(4) Requiring as a condition to a sale, allocation, consignment or delivery for resale of any paper, magazine, book, periodical or publication to a purchaser or consignee that such purchaser or consignee also receive or accept any obscene material, as defined in Paragraph (3) above, for resale, distribution, display, advertisement or exhibition purposes; or, denying or threatening to deny a franchise to, or imposing a penalty on or against, a person by reason of his refusal to accept, or his return of, such obscene material.

(5) Solicitation or enticement of an unmarried person under the age of seventeen years to commit any act prohibited by Paragraphs (1), (2) or (3), above.

(6) Advertisement, exhibition or display of violent material. "Violent material" is any tangible work or thing which the trier of facts determines depicts actual or simulated patently offensive acts of violence, including but not limited to, acts depicting sadistic conduct, whippings, beatings, torture and mutilation of the human body.

B. Lack of knowledge of age or marital status shall not constitute a defense.

C. No theatre employee or bookstore employee acting within the course and scope of a bona fide contract of employment wherein such employee is employed by any person, firm or corporation exhibiting motion pictures or selling books, periodicals or other published materials pursuant to a license or permit to exhibit or sell the same issued by the State of Louisiana or any municipality, parish or consolidated city-parish government therein, shall be guilty of a violation of this section as a result of his possession, exhibition or sale within the course and scope of such employment provided such employee has no managerial duties and has no financial interest in the possession, exhibition or sale of any materials other than wages from his said employment, unless there is no person having managerial duties or a financial interest in the possession, exhibition or sale of obscure[1] materials subject to immediate arrest and prosecution.

D. The provisions of this section do not apply to recognized and established schools, churches,

museums, medical clinics, hospitals, physicians, public libraries, governmental agencies, quasi-governmental sponsored organizations and persons acting in their capacity as employees or agents of such organization.

For the purpose of this paragraph, the following words and terms shall have the respective meanings defined as follows:

(1) Recognized and established schools means schools having a full time faculty and pupils, gathered together for instruction in a diversified curriculum.

(2) Churches means any church, affiliated with a national or regional denomination.

(3) Physicians means any licensed physician or psychiatrist.

(4) Medical clinics and hospitals mean any clinic or hospital of licensed physicians or psychiatrists used for the reception and care of the sick, wounded or infirm.

E. This section does not preempt, nor shall anything in this section be construed to preempt, the regulation of obscenity by municipalities, parishes and consolidated city-parish governments; however, in order to promote uniform obscenity legislation throughout the state, the regulation of obscenity by municipalities, parishes and consolidated city-parish governments shall not exceed the scope of the

regulatory prohibitions contained in the provisions of this section.

F. (1) Except for those motion pictures, printed materials and photographic materials showing actual ultimate sexual acts or simulated or animated ultimate sexual acts when there is an explicit, close-up depiction of human genital organs so as to give the appearance of the consummation of ultimate sexual acts, no person, firm or corporation shall be arrested, charged or indicted for any violation of a provision of this section until such time as the material involved has first been the subject of an adversary hearing under the provisions of this section, wherein such person, firm or corporation is made a defendant and, after such material is declared by the court to be obscene, such person, firm or corporation continues to engage in the conduct prohibited by this section. The sole issue at the hearing shall be whether the material is obscene.

(2) The hearing shall be held before the district court having jurisdiction over the proceedings within seventy-two hours after receipt of notice by the person, firm or corporation. The person, firm or corporation shall be given notice of the hearing by registered mail or by personal service on the owner, manager or other person having a financial interest in the material; provided, if there is no such person on the premises, then notice may be given by personal service on any employee of the person, firm or corporation on such premises. The notice shall state the nature of the violation, the date, place and time of the hearing, and the right to present and cross examine witnesses.

(3) The state or any defendant may appeal from a judgment. Such appeal shall not stay the judgment. Any defendant engaging in conduct prohibited by this section subsequent to notice of the judgment, finding the material to be obscene, shall be subject to criminal prosecution notwithstanding the appeal from the judgment.

(4) No determination by the district court pursuant to this section shall be of any force and effect outside the judicial district in which made; and no such determination shall be res judicata in any proceeding in any other judicial district. In addition, evidence of any hearing held pursuant to this section shall not be competent or admissible in any criminal action for the violation of any other section of this title; provided, however, that in any criminal action, charging the violation of any other section of this title, against any person, firm or corporation that was a defendant in such hearing, involving the same material declared to be obscene under the provisions of this section, then evidence of such hearing shall be competent and admissible as bearing on the issue of scienter only.

G. Whoever commits the crime of obscenity shall be fined not less than one hundred dollars nor more than one thousand dollars, or imprisoned in the parish prison for not more than one year, or both.

When a violation of Paragraphs (1), (2) or (3) of Subsection A of this section is with, or in the presence of, an unmarried person under the age of seventeen years, the offender shall be fined not more than two thousand dollars, or imprisoned for not more than five years with or without hard labor, or both.

LOUISIANA REVISED STATUTES 14:

§ 41. Rape; heterosexual; defined

Heterosexual rape is the act of sexual intercourse with a female person not the wife of, or judicially separated from bed and board from, the offender, committed without her lawful consent. Emission is not necessary; and any sexual penetration, vaginal or anal, however slight, is sufficient to complete the crime.

LOUISIANA REVISED STATUTES 14:

§ 41.1 Rape; homosexual; defined

Homosexual rape is the act of anal sexual intercourse with a male person committed without his consent. Emission is not necessary, and any anal sexual penetration, however slight, is sufficient to complete the crime.

LOUISIANA REVISED STATUTES 14:

§ 89. Crime against nature

Crime against nature is the unnatural carnal copulation by a human being with another of the same sex or opposite sex or with an animal, except that anal sexual intercourse between two human beings shall not be deemed as a crime against nature when done under any of the circumstances described in R.S. 14:41, 14:41.1, 14:42, or 14:43. Emission is not necessary; and, when committed by a human being with another, the use of the genital organ of one of the offenders of whatever sex is sufficient to constitute the crime.

Whoever commits the crime against nature shall be fined not more than two thousand dollars, or imprisoned, with or without hard labor, for not more than five years, or both.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-961

WARREN GAMBINO,

Petitioner,

versus

STATE OF LOUISIANA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

RESPONSE OF STATE OF LOUISIANA, RESPONDENT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78-961

WARREN GAMBINO,
Petitioner,

versus

STATE OF LOUISIANA,
Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Louisiana

RESPONSE OF STATE OF LOUISIANA, RESPONDENT

I.

RETROACTIVE APPLICATION

In his Petition For Certiorari relator contends that he is the victim of a "retroactive application" of the Louisiana Supreme Court's interpretation of the Louisiana obscenity statute, R.S. 14:106.

First, it is the State of Louisiana's position that this question cannot be inquired into by this Honorable Court on Petition For Certiorari because it was never argued in the Louisiana Supreme Court, and, more specifically, was not raised in petitioner's Application For Rehearing in that court, or in any other pleading filed in the Louisiana courts.

Alternatively, the argument lacks merit. In holding that four pictures in "National Screw" "give the appearance of the consummation of the ultimate sexual act of cunnilingus", the Louisiana Supreme Court was not giving a new interpretation to the Louisiana obscenity statute, but rather was concluding that the pictures in question, as a matter of fact, satisfied the test of "printed materials . . . showing actual ultimate sexual acts or simulated or animated ultimate sexual acts when there is an explicit, closeup depiction of human genital organs so as to give the appearance of the consummation of ultimate sexual acts" set out in R.S. 14:106 F (1).

2.

R.S. 14:106 AS APPLIED IS NOT VAGUE AND OVERBROAD

The Louisiana obscenity law, R.S. 14:106, refers to actual or simulated ultimate sexual acts. This statute is largely based on this Court's opinion in *Miller v. California*, 413 U.S. 15 (1973), where, at 413 U.S., 25, the phrase "ultimate sexual acts, normal or perverted, actual or simulated" appears.

The State of Louisiana respectfully submits that there is nothing vague or overbroad in the Louisiana Supreme Court's holding in this case that the photographs in question "give the appearance of the consummation of the ultimate sexual act of cunnilingus." 362 So.2d, at 1110.

In order to enable this Court to determine the correctness of the Louisiana Supreme Court's decision herein the State of Louisiana has had the Louisiana Supreme Court Clerk's Office send to this Court, as part of the State of Louisiana's Response in this proceeding, a certified copy of the magazine "National Screw" which forms the basis of this prosecution.

3.

SPECIAL JURY CHARGES

No question concerning the trial court's refusal to give to the jury certain special charges requested by defense counsel was argued at any time in the Louisiana Supreme Court when this case was appealed to that court. The issue is not referred to in the brief to that court filed by either petitioner herein or the State of Louisiana, and is nowhere addressed in the opinion of the Louisiana Supreme Court in this proceeding. See *State v. Gambino*, 362 So.2d 1107 (La. 1978).

Under the settled jurisprudence of the Louisiana Supreme Court, matters not urged on appeal are waived. See, for example, *State v. Phillips*, 337 So.2d 1157 (La. 1976), and cases there cited.

Consequently, this issue cannot be urged in the Petition For Certiorari herein in the respectful opinion of the State of Louisiana.

4.

THE TRIAL JURY

On March 21, 1978, this Court handed down its decision in *Ballew v. Georgia*, 435 U.S. 223, declaring unconstitutional under the Sixth and Fourteenth Amendments to the United States Constitution the Georgia law permitting trial by a five-person jury, all of whom must concur in the verdict.

Although the trial in this case took place in November of 1977, prior to *Ballew*, the appeal herein was pending in the Louisiana Supreme Court on the date *Ballew* came down, having been lodged in that Court on March 7, 1978. However, petitioner did not raise this five out of six jury verdict question at any time in the Louisiana Supreme Court, advancing it for the first time in the Petition For Certiorari. Under these circumstances the State of Louisiana submits that the matter has been waived because not raised in the Louisiana courts.

Alternatively, the contention lacks merit. In this connection the State of Louisiana adopts here the argument set out in its brief to this Court in *Daniel Burch and Wrestle, Inc. v. Louisiana*, no. 78-90, which is scheduled for argument in this Court on February 21, 1979.

5.

THE "TAKEN AS A WHOLE" TEST

Petitioner contends that some of the articles in the July, 1977, issue of "National Screw" are not pornographic and deal seriously with topics of everyday interest to its readers, and that the Louisiana Supreme Court erred in holding that this fact was immaterial as far as a finding of obscenity was concerned because

> ". . . that material has no rational relationship to that found by the jury, the trial judge and this Court to be hard-core sexual depictions. It is the offensive depiction of sexual conduct itself which must have 'serious literary, artistic, political or scientific value' to merit First Amendment protection. It has often been held that obscene material is not protected by the First Amendment. *Miller v. California*, supra. Placing prohibited obscene depictions in a magazine, book, or newspaper which contain other, unrelated articles or pictures of literary, etc., value, does not suffice to make obscenity legally acceptable. 'A quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication.' *Kois v. Wisconsin*, 408 U.S. 229, 92 S.Ct. 2245, 33 L.Ed.2d 312 (1972)." 362 So.2d, at 111-112.

In arguing that the foregoing is incorrect petitioner relies on *Penthouse Intern., Ltd. v. McAuliffe*, 454 F.Supp.

289 (N.D. Ga. 1978), which holds that segmented review of a book or magazine, when on balance the redeeming features of the work outweigh any of its arguably obscene portions, is erroneous.

The State of Louisiana believes that each obscenity case involving a magazine must be judged by its particular facts, and that "National Screw" is clearly not in the same category as "Playboy", "Penthouse", and "Oui". Moreover, a casual glance at "National Screw" for July, 1977, reveals that the latter magazine taken as a whole encourages a morbid, rather than a healthy, interest in sex, and that on balance the obscene portions far outweigh the remainder of this magazine. See July, 1977, issue of "National Screw" which has been sent to this Court in connection with this Response.

CONCLUSION

The State of Louisiana respectfully asks this Honorable Court to deny the Petition For Certiorari being sought herein.

WILLIAM J. GUSTE, JR.,
Attorney General of
Louisiana

HARRY F. CONNICK,
District Attorney of
Orleans Parish

LOUISE KORNS,
Assistant District Attorney
of Orleans Parish

2700 Tulane Avenue
New Orleans, Louisiana 70119

CERTIFICATE

I certify that three copies of this Response have been sent to:

William M. Lucas, Jr., Esq.
and
Patrick Rankin, Esq.
1006 First National Bank of Commerce Bldg.
210 Baronne Street
New Orleans, Louisiana 70112

Attorneys for Petitioner

This ____ day of February, 1979.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-961

WARREN GAMBINO,

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REPLY BRIEF OF WARREN GAMBINO, PETITIONER

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REPLY BRIEF OF WARREN GAMBINO, PETITIONER

MAY IT PLEASE THE COURT:

Petitioner, Warren Gambino, replies to the Response of the State of Louisiana:

1.

RETROACTIVE APPLICATION

In its Response, the State contends that this Honorable Court may not consider the issue of retroac-

tive application of a new statutory interpretation because it was not raised before the Louisiana Supreme Court. It would appear obvious that the issue could not have been raised until the statute was interpreted and applied retroactively by the Louisiana Supreme Court.

2.

VAGUENESS AND OVERBREADTH

The portion of the Louisiana Obscenity Statute at issue in the present case is not, as the State implies in its Response, based upon *Miller v. California*, 413 U.S. 15 (1973). It is based on *Paris Adult Theatre I v. Slayton*, 413 U.S. 39 (1973) and was designed to give the retail merchant "the best possible notice, prior to any criminal indictments, as to whether the materials are unprotected by the First Amendment and subject to state regulation." *Ib* at 55. The basis of Petitioner's argument is simply that, through its application of the Statute in this case, the Louisiana Supreme Court has made it impossible for the retailer to know whether or not he will receive such notice.

The subjective nature of the Louisiana Supreme Court's reasoning is reflected in the State's Response. Neither explains the manner in which photographs are able to use "an explicit close-up depiction of human genital organs so as to give the appearance of the consummation of ultimate sexual acts" without depicting sexual penetration.

3.

SPECIAL JURY CHARGES

The State contends in its Response that the issue of special jury charges was not presented to the Louisiana Supreme Court. In fact, the issue was squarely raised by Assignments of Error 14 and 16, was briefly discussed in Gambino's brief, and the Louisiana Supreme Court questioned Counsel on this issue during oral argument. In its opinion, the Louisiana Supreme Court purported to decide Assignments of Error 14 and 16. See *State v. Gambino*, 362 So.2d 1107, 1109 (La.1978). Because the Louisiana Supreme Court's opinion incorrectly stated, as a fact, that the jury had made the disputed determination, *Ib* at 1110, 1111, Gambino again urged this issue in his Application for Rehearing.

Thus Petitioner raised the jury charge issue at every stage of the State proceedings with no success. He has never, as the State contends in its response, waived this issue nor does he desire to do so.

4.

THE TRIAL JURY

The State is correct in its contention that Gambino failed to raise this issue before the Louisiana Courts. The issue is, however, "plain error" and has been specifically characterized as such by the Louisiana Supreme Court in *State v. Wrestle, Inc.*, 360 So.2d 831, 837 (now pending on the docket of this Honorable

Court *sub nom Daniel Burch and Wrestle, Inc. v. State of Louisiana*, No. 78-90.) Accordingly, this Honorable Court may take cognizance of the issue pursuant to its own "plain error" doctrine as stated in Supreme Court Rule 40(d).

The purpose of requiring submission of issues to State Courts prior to this Honorable Court is to allow correction of constitutional error at the lowest possible level and to conserve the time of the Supreme Court of the United States. In the present case, such submission would have accomplished neither purpose. The Louisiana Supreme Court had already determined this issue on June 19, 1978 in *State v. Wrestle, Inc., supra*. There is no reason to believe that a different result would have been reached on September 5, 1978, when the present case was decided.

5.
THE "TAKEN AS A WHOLE" TEST

In its Response, the State does not even contend that the Louisiana Supreme Court applied the correct standard in its independent review of "National Screw." Instead, it argues that the alleged obscene portions of the magazine outweigh its socially acceptable features. When the Louisiana Supreme Court was faced with Petitioner's similar *factual* argument that the protected portions outweighed the obscene, it chose not to apply the test. This choice was constitutionally erroneous and calls for the issuance of a Writ of Certiorari.

The State attempts to distinguish *Penthouse Intern., Ltd. v. McAuliffe*, 454 F. Supp. 289 (N.D. Ga. 1978) not on the legal issues decided therein but on the "fact" that " 'National Screw' is clearly not in the same category as 'Playboy', 'Penthouse', and 'Oui' ". See State Response, p.6. Generally, there is little difference in the format of the various magazines, each consisting of a mixture of sexually and non-sexually oriented material. While "National Screw" may be more inexpensively produced than the others, the size of one's pocketbook has never been the measure of constitutional protection.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this ____ day of February, 1979, forwarded three copies of the foregoing Reply Brief of Warren Gambino to the District Attorney for the Parish of Orleans, Honorable Harry Connick, by United States mail, postage prepaid.

WILLIAM M. LUCAS, JR.